THE

AMERICAN LAW REGISTER.

JANUARY, 1855.

IS AN ABRIDGMENT AN INFRINGEMENT OF THE COPYRIGHT OF THE ORIGINAL WORK?

"Many cases [are] to be found in the reports, which decide that a *bona fide* abridgment of a book is not an infringement of copyright." It not unfrequently happens that when the foundation of what is without hesitation taken or asserted as an established legal principle, is sought for, it is found to be of no more solid a character than an accumulation of *dicta* made in the course of a series of decisions relating to other branches of the same general subject. There may be in fact not a single case in which the precise point has arisen; and yet *dicta* on that point been so often and so broadly and confidently enunciated, that bearing upon their face the semblance of authority, when the case actually does arise which calls for a direct and positive decision upon the very question, the judicial mind, misled by appearances, may yield to the supposed pressure of authority, and feel compelled to decide upon the maxim *stare decisis* against the bent of its inclination from reason and principle. It may not be without a practical bearing, therefore, to examine the grounds for the *dictum* which stands at the commencement of this article, and which is to be found in the opinion of Mr. Justice Grier in *Stowe* vs. *Thomas*, (2 Am. Law Reg.

210; 2 Wallace, Jr. 547, 566,) where the point before the Court was, Whether a translation into another language is an infringement of the copyright in the original work, where such original work is protected by copyright in the same country in which such translation is printed, published, imported, or offered for sale?

The most recent case upon the point, is *Story's Ex'rs* vs. *Holcombe et al.*, (4 McLean, C. C. R. 306,) decided by Mr. Justice McLean in the Ohio district in 1847. An injunction was sought by the representatives of the late Mr. Justice Story as holders of the copyright in his "Commentaries on Equity Jurisprudence," to restrain the defendants from printing and publishing "An introduction to Equity Jurisprudence, on the basis of Story's Commentaries, etc., by James P. Holcombe." Defence—that the work complained of was a *bona fide* abridgment of the Commentaries." In the outset of the opinion the Court state, "the decision must turn on the question of abridgment;" and yet by reference to the conclusion of the opinion, it will be seen that an injunction was granted against the first hundred pages of the work complained of, as being a compilation and as such an "infringement of the plaintiff's rights, on the ground that the plan of the Commentaries is copied; and also for the reason that the extracts extend beyond the proper limit for such a work." And this had the same practical effect as an injunction against the whole book. "The remaining two-thirds of the book *may be* comprehended *under a liberal construction* of an abridgment." There is in this language no positive refusal of an injunction against the remainder of the book on the ground of its being a fair abridgment and therefore no infringement.

But, although not required by the circumstances of the case before him, the learned judge decides that a "fair abridgment" is no infringement. This decision is made solely on the ground of authority, for he expressly states "the reasoning on which the right to abridge is founded, seems to me to be false in fact," and he recognizes the same test of infringement as that suggested by Mr. Curtis, (Copyright p. 240,) viz: "Is the legitimate tendency of the act complained of to injure the original author?" He goes on to state, "But a contrary doctrine has been long established in Eng-

land; and in this country the same doctrine has prevailed. I am, therefore, bound by precedent; and I yield to it in this instance, more as a principle of law, than a rule of reason or justice."

What authorities are cited to sustain this position? First in point of time is *Gyles* vs. *Willcox*, (2 Atk. 141, an. 1740), where an injunction was asked against a work entitled "Modern Crown Law," alleged to be an infringement of Lord Hale's "Historia Placitorum Coronæ." The injunction was granted on the ground that the work complained of was a "merely colorable" shortening, by which "some words out of the Historia are left out only, and translations given instead of the Latin and French quotations that are dispersed through Sir Matthew Hale's work." In the course of the decision, however, Lord Hardwicke says, "Abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning and judgment of the author is shown in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of the author." This *dictum* was thrown in merely to prevent the decision being considered as an authority for more than the point actually before the Court; a purpose which is defeated, if the reservation properly made is to be regarded as an absolute ruling of the case reserved for decision when it should present itself. It is true that in *Tonson* vs. *Walker*, (3 Swanst. R. 679,) Lord Eldon, remarks in reply to a suggestion in the course of the argument, "In *Gyles* vs. *Willcox*, the abridgment contained 35 sheets, the original 276, it was referred to award, and held a fair abridgment and not within the Statute." But as *Gyles* vs. *Willcox* was decided in 1740, and Lord Eldon was born in 1751, he could not have spoken from any personal knowledge on the subject of the case, and especially when he was but thirteen years old at the time of Lord Hardwicke's death. The remark, therefore, must be taken *cum grano salis*, and not received as authoritative as to the final result of *Gyles* vs. *Willcox*, when no mention of it subsequent to the reference, is made by any of the reporters.

An *Anonymous Case* in Lofft, 775, (an. 1774), is the next authority cited by Mr. Justice McLean. The application was for an

injunction against Newberry's abridgment of Dr. Hawkesworth's Voyages, and was heard before Lord Bathurst, whom Lord Campbell, (Lives of the Lord Chancellors, Chap. 52, Vol. 5, p. 336, Amer. edit.) pronounces "little qualified for intellectual pursuits." Had it not been for the fact that Sir William Blackstone was consulted upon the case, the intrinsic weight of this authority would be very little. The ground upon which it is rested is, that "to constitute a true and proper abridgment of a work, *the whole must be preserved in its sense;* and then the act of abridgment is an act of the understanding employed in carrying a large work into a smaller compass, and rendering it less expensive and more convenient both to the time and use of the reader, which made an abridgment *in a measure* a new and meritorious work." And, therefore, "An abridgment when the understanding is employed in retrenching unnecessary and uninteresting circumstances which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property in the author of it, but an allowable and meritorious work." If the principle here laid down is a just one, it would authorize some of the most barefaced literary thefts. This abridgment would seem from the language of the Chancellor to have been a mere retrenchment of what was considered by Mr. Newberry as "unnecessary and uninteresting" matter; and must, therefore, be considered as overruled by the late case of *Bohn* vs. *Bogue*, (10 Lond. Jur. 420, an. 1846,) where Mr. Hazlitt the editor of "*A Life of Lorenzo de Medici,*" published by defendant, avowedly founded upon Mr. Roscoe's "*Illustrations of the Life of Lorenzo de Medici,*" the copyright of which was held by plaintiff, "first of all threw overboard as utterly worthless—as of no use whatever to anybody—of no interest whatever—the greatest part of the work" which he made the basis of his own publication, but used and copied what he thought of most value; and an injunction was granted. And the note of the case of *Trusler* vs. *Murray*, (an. 1789, 1 East, 362, n.,) throws much doubt on the case in Lofft. "In this case though some parts of the chronological work were different, yet in general it was the same, and in particular pages 20 to 34 was a literal copy. Lord Kenyon was of opinion that plaintiff could recover. Lord

Bathurst had been of that opinion, and he thought rightly, with respect to the publication of some original poems by Mr. Mason with others before published, *and the like with respect to an abridgment of Cook's Voyages around the World.*"

The third and last English case relied upon is *Bell* vs. *Walker*, (1 Bro. C. C. 451, an. 1785.) Passages were read from the two works to show that the facts and even the terms in which they were related in the book against which an injunction was prayed were taken frequently *verbatim* from the original work. Sir Thomas Sewell, M. R. said, "If this was a fair *bona fide* abridgment of the original work, several cases in this Court had decided an injunction should not be granted. It had been so determined with respect to to Dr. Hawkesworth's Voyages. He should not decide at present *whether it were such*, or a piracy from the former. But he had heard sufficient read to entitle the plaintiff to an injunction till answer and further order." Now the only reported prior case touching on abridgments in addition to those already commented upon is *Dodsley* vs. *Kinnersly*, (Ambler, 403, an. 1761,) in which the narrative part of Johnson's Rasselas had been published by defendant, omitting the moral reflections. And Sir Thomas Clark, M. R., in delivering his opinion refusing an injunction, says, "What I materially rely upon is, that it could not tend to prejudice the plaintiffs when they had before published an abstract of the work in the London Chronicle." The authority of *Bell* vs. *Walker* can be regarded as of no more weight than can be attached to a *dictum* entirely uncalled for by the case before the Court. The case of *Read* vs. *Hodges*, (an. 1740,) is cited in *Gyles* vs. *Willcox* as if it was an authority upon the question with reference to abridgments; but the infringement complained of was in fact a *verbatim* reprint of plaintiff's work, only several pages left out bodily.

The only American authority cited to sustain the position that in this country the same doctrine has prevailed, is *Folsom* vs *Marsh*, an. 1841, (2 Story R. 106.) The question in this case arose upon the publication by defendants, of a Life of Washington, which was alleged to be an infringement of Mr. Sparks' Life and Writings of George Washington. Three hundred and nineteen pages of defend-

ants' work had never appeared in print before they were published by plaintiffs, and were reported by the Master to whom it was referred to ascertain the facts (and his report was not excepted to) to have been copied from plaintiffs' book. And upon this ground, viz: that parts of the work "imparting to it its greatest, nay, its essential value" were copied from the plaintiffs', an injunction was granted. "But," says the learned judge, "if it had been the case of a fair and *bona fide* abridgment of the work of the plaintiffs it might have admitted of a very different consideration." And in the preliminary or introductory part of his opinion he uses the following language. "It has been decided that a fair *bona fide* abridgment of an original work is not a piracy of the copyright of the author. But then, what constitutes a fair and *bona fide* abridgment in the sense of the law is one of the most difficult points under particular circumstances, which can well arise for judicial decision. It is clear, that a mere selection—a different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work." As the case, however, did not call for the decision of the question now under examination, it cannot be regarded as expressly ruling the point; although a *dictum* of Mr. Justice Story is entitled to much weight. To sustain this *dictum*, the cases of *Whittingham* vs. *Wooler*, (2 Swanst. R. 428) and *Tonson* vs. *Walker*, (3 id. 672,) in addition to the cases of *Dodsley* vs. *Kinnersley*, and *Gyles* vs. *Willcox*, already mentioned, are cited. *Whittingham* vs. *Wooler* was a case where the defendant had inserted in a periodical work of theatrical criticism, detached extracts to the extent of six or seven pages from a farce, the property of the plaintiffs, interspersed with criticism. It was not pretended or argued that any question as to abridgment was presented by the case. In *Tonson* vs. *Walker*, an injunction was granted to restrain the publication of Dr. Newton's Notes to Milton's Poems, notwithstanding a small addition of original commentary by the defendant. It was a case of *verbatim* copy-

ing; and yet Lord Eldon travels out of the way to say, that "a fair abridgment would be entitled to protection."

Such are the authorities by which Mr. Justice McLean felt himself bound, contrary to the dictates of his own reason on grounds of principle. The only remaining cases upon which the *dictum* of Mr. Justice Grier in *Stowe* vs. *Thomas* can rest, are *Butterworth* vs. *Robinson*, (5 Ves. 709;) and *Gray* vs. *Russell*, (1 Story R. 11.)

The report of *Butterworth* vs. *Robinson* is exceedingly meagre; but shows that the work complained of and against which an injunction was granted, was with the exception of leaving out some parts of the cases, a mere copy *verbatim* of among others the Term Reports, of which the plaintiff was proprietor, comprising all the cases published in that work. There is no discussion of principles in the decision of the Lord Chancellor as reported; and the case goes no farther than to decide that a *verbatim* reprint of parts of an original work cannot be covered up under the title of an abridgment. In *Gray* vs. *Russell*, it was not pretended that the work complained of was an abridgment, for so literal had been the transcription that the defendant "incorporated the very errors" of plaintiff's work. But Mr. Justice Story after stating, that "In some cases, indeed, it may be a very nice question what amounts to a piracy of a work or not;" and entering into a discussion with reference to extracts for the purpose of criticism and review,—abridgments,—and Law Reports; says expressly, "We are spared from any nice inquiries of this sort in the present case." The point in question did not come up for decision.

It would seem, therefore, from an examination of the authorities, that there is in reality no case in which the question has been presented for direct decision, Whether an abridgment (no matter how *bona fide*) is an infringement of the copyright of the original?—

Should it then be regarded as finally and definitively settled? The reason of other judicial minds besides Mr. Justice McLean's, does not assent to what seems to have been tacitly received as an established principle. Lord Campbell (Lives of the Lord Chancellors vol. 5. p. 72, Amer. edit.) says, "I must own, that I much question another rule he [Lord Hardwicke] laid down with respect to literary property, although it has not yet been upset. *Gyles* vs.

Willcox, (2 Atk. 142) and see Lofft, 775. I confess I do not understand why an abridgment tending to injure the reputation, and to lessen the profits of an author, should not be considered an invasion of his property." When an actual case presenting the precise point is presented for judicial determination and expressly decided, it will be time enough to regard the question as settled by authority.

Till then, however, it must still be regarded as open for discussion.

In the Circuit Court of the United States for the Hartford District.

THE AMERICAN PIN COMPANY *vs.* THE OAKVILLE COMPANY ET AL.

1. The extent of the rights secured to the patentee stated, and the case of *O'Reilly* vs. *Morse* cited and affirmed.
2. The means specified in the patent to produce the effect, and nothing more, are secured to the patentee, and there can be no infringement unless the same substantial means are used in both the plaintiffs' and defendants' machines.

The facts of this case fully appear in the opinion of the Court, which was delivered by

INGERSOLL, J.—The complainants, by their bill seek to enjoin the defendants from using a machine to paper pins, the right to use which, they claim to be exclusively vested in them. The foundation of their claim rests upon two certain patents, the right to which Patents, with the privileges by such patents granted, they now have by virtue of assignments from the patentees. One of these patents, was issued to Samuel Slocum, and bears date the 30th day of September, A. D. 1841, and was to run for fourteen years from the last mentioned date. The other Patent was issued to John J. Howe, and bears date the 24th of February, A. D. 1843, and was to run fourteen years from the 5th day of December, A. D. 1852. The validity of these patents is not contested by the defendants. They admit that the complainants have all the rights which these Patents purport to grant. They admit further, that they are using a machine for papering pins; but they deny, that by such use, they have infringed upon any of the rights so granted by such patents.

The defendants claim a right to use the machine for the papering of pins, which they are operating, upon the ground that by such use, they do not infringe upon any rights granted by such patents, or either of them. They claim also that the right to use such machine, so operated by them is exclusively vested in them by virtue of a patent granted to Chauncey O. Crosby, and which last mentioned patent, they have by virtue of an assignment from the patentee.

There has been heretofore, at times, some diversity of opinion, as to the extent of the rights, secured to an inventor or discoverer, by the patent issued in his favor. The Supreme Court of the United States have however, settled and determined, what rights are so secured to the patentee; so that now, there can be no diversity of opinion on the subject. In the case of *O'Reilly et al.* vs. *Morse, et al.* 15 Howard's Reports, page 62, the rule as laid down by the Chief Justice, in giving the opinion of the Court, is in substance as follows:

He who discovers that a certain useful result will be produced in any art, machine, manufacture or composition of matter, by the use of certain means, is entitltd to a patent for such discovery, provided he sets forth in his specification, the means he uses to produce such useful result, in a manner so full and exact, that any one skilled in the art or business to which it appertains can by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. And if this cannot be done, by the means he describes, the patent is void. And if it can be done then the patent confers on him the exclusive right, to use the means he specifies, to produce the result or effect he describes, and nothing more. And it makes no difference in this respect, whether the effect is produced by chemical agency or combination, or by the application of discoveries or principles in natural philosophy known or unknown, before his invention; or by machinery acting together upon mechanical principles. In either case he must describe the manner and process as above mentioned, and the end it accomplishes. And every one may lawfully accomplish the same end, and without infringing the patent, if he uses means substantially different from those described. But if the means used to accomplish the

same end, are substantially like those which the patentee describes, the patent has been infringed, and the one using them must be responsible for such infringement.

The rules thus laid down must govern this case. The patent does not secure to the patentee the result or effect produced, but only the means described, by which such result or effect is produced.

The means which he specifies, to produce the result or effect, are secured, and nothing more. And all other means to produce the same result or effect and not patented to any one, are open to the public. A mere change in the form of the machinery, however, or the means specified, by which the result or effect described is produced; or an alteration in some of the unessential parts, or a substitution or use of known equivalent mechanical powers, not varying essentially the machine, or its mode of operation or organization, will not make the new machine a new invention. The patentee may however limit his claim, in his specification, to one particular form of machine, and thus exclude all other forms, though such other forms, would embody his invention, and thereby not secure to himself, the whole that he has invented. In such a case, he is secured only in the particular form claimed. The patent law was intended to secure to the inventor, his whole invention or discovery, but not unless he claimed to be secured, in the whole. And if he claims only a part, or some particular form, such part, or particular form only is secured to him. No more can be secured by the patent, than has been invented or discovered; and no more can be secured, than is claimed to be secured in the specification.

In the case of *Winans* vs. *Denmead*, 15 Howard, 330 the substantial means used by the defendant to accomplish the object sought, were the same as those described and claimed in the specifications to the plaintiffs' patent. There was no other change, than a slight change of form not varying in substance the means used by the plaintiff and set forth and described in the specification to his patent. And as a mere change in the form of the machinery, or the means specified, by which the result is produced, not varying essentially the mode of operation of the thing patented, will not vary its organization, or be deemed a new or different invention, the de-

fendant was deemed to have been an infringer of the plaintiffs' rights secured to him by his patent.

The invention of Slocum as described in his specification, is a "machine for sticking pins into paper" in a row. It consists of a horizontal plate as described, with as many grooves, as the number of pins, intended to be stuck in a row; which grooves are of sufficient length and depth to receive one pin and one only; a sliding hopper so constructed as to hold a number of pins, one directly over the other in a horizontal position, and so made to slide directly over the grooves, as to deposite one of the pins in each groove by gravitation; and a sliding plate or follower, upon the front edge of which project a system of points or wires corresponding with the grooves, so that when the sliding plate or follower is driven forward, the wires enter the grooves, in which the pins are separated, and drive forward the pins, which are thus made to perforate the previously adjusted folds of a folded and crimped paper, which is held between clamps. And in the specification Slocum claims as his invention, the plate with grooves, as described, for separating the pins, the sliding hopper, which deposites the pins in the grooves as described; and the sliding plate or follower, with the wires attached thereto, in combination with the groove plate as described, and also these in combination with the hopper as described. The invention of Howe, as described in his specification, is for an improvement on Slocum's machine for sheeting pins, that is, for sticking pins in rows in sheets of paper. The machine of Slocum did not crimp the paper. But the paper was crimped in the old way by a separate operation, and then taken out of the crimping apparatus, and placed in clamps, and while in such clamps, and out of the crimping jaws, the pins perforated through the crimps previously formed, and in that way were sheeted. The improvement of Howe upon the machine of Slocum, crimped the paper, and the pins were stuck in rows in the paper, while the paper was within and held by the crimping apparatus.

This improvement consisted of transverse notches made in the crimping jaws of the old crimping apparatus, so that the pins could enter at proper distances between the crimping jaws, and perforate the paper, while the same was being crimped. Before this improve-

ment, no method was known by which the pins could be made to penetrate the paper, and thus be sheeted, while the paper was under the process of being crimped. The old mode was to stick the pins after the paper had been crimped. Howe's improvement was by means of these transverse notches, to stick the pins, while the paper was in the crimping process, when it was being crimped, and while the crimper, which crimped the paper, held the paper in the form that it was crimped. It was not to sheet the pins, after the paper had gone through the crimping process, and had passed out of the crimping jaws. He in substance took the old English crimping bar, and made transverse notches in it, at suitable distances between the jaws, so that the pins could penetrate through these notches, into and through the crimps of the paper when the paper was within the crimping jaws, and in the process of being crimped.

The patent which was granted to Crosby, bears date the first day of April, A. D. 1851. The machine which the defendants are operating, is constructed substantially according to the specifications annexed to that patent. Crosby in his specification claims to be the inventor of "a new and useful machine for sticking pins," and the patent is granted to him according to his claim for "a new and useful machine for sticking pins on paper." The specification and claim are not for an improvement on Slocum's machine, or on Howe's machine for sticking pins; but for an independent machine, governed by different principles; for a machine to produce a result, by means substantially different from the means secured to either Slocum or Howe, to produce a like result, to wit, the "sticking of pins on paper." The patent is prima facie evidence, that Crosby has an exclusive right to that which the patent purports to grant; that he is the first inventor of the machine specified and described in his specifications; that he is the first inventor of an independent machine, governed by different principles, and using means, substantially different from the means used by either Slocum or Howe, to produce the like result. *Corning et al.* vs. *Burden*, 15 Howard, 252. The patent therefore to Crosby affords prima facie evidence, that the means described by him in his specifications, to produce the result of sticking pins on paper, are substantially different from the means described either by Slocum or Howe to produce the like result.

And the complainants, to succeed in their application, must counteract this prima facie evidence, by sufficient countervailing testimony.

The object of Crosby's machine, is to stick pins in a fillet of paper across the strip of paper, the crimps being length-wise of the paper; to crimp the paper in that way, and coil the fillet, when stuck, into a roll of any convenient size; so that the heads of the pins will be presented on the disk of the roll, and all by one continued operation. The essential parts of the machine, as operated by the defendants, or the substantial means by which the desired result of sticking the pins on paper is produced, are crimping rollers, by which the paper is crimped; an inclined channel way formed by two bars, by which the pins are made to slide down in a verticle position, hanging by their heads, between the two bars; a revolving screw, one end of which is placed at the bottom of the channel way, and by revolving, at each revolution is made to take in its thread, from the bottom of this channel way, one pin at each revolution, from the body of pins in the channel way, and separate the same from the body of pins, and carry it by the mechanical force of the revolution of the separating screw, to the other end of the screw, to change the pin from a vertical to a horizontal position, and at the end of the screw to which the pin is carried, to cause it to drop, in a horizontal position into a groove-channel; and a punch at the head of the pin, as it is dropped into the groove-channel, which by machinery is made to drive the pins forward at regular intervals, as fast as they drop into the groove-channel, into the crimped paper, after it has passed out of the jaws of the crimping rollers. When the paper is stuck, it has, in the place where stuck, passed out of the crimping jaws: and during this operation, one end of the paper is held in a rigid state by the crimping rollers, and the other end by the coiling roller. The paper is stuck on its passage from the crimping rollers to the coiling roller; and as the paper is stuck, it is coiled into a roll. The machine is automatic, while other machines known before, are not so.

The object of Slocum was to paper the pins at given specified distances apart. And for that purpose, he used a plate, with a cer-

tain number of grooves in it, into which the pins were placed by certain machinery, and through which grooves the pins were pushed into the paper. The distances apart, at which the pins were pushed into the paper were regulated and controlled by the distances of the grooves in the plate, and by these distances only. And his machine was so organized as to regulate the distances at which the pins should be separated and stuck into the paper by the distances apart of the grooves in the plate. This was a mechanical law of his machine. There is no such mechanical law of the defendants' machine.

As in the machine of Crosby there is only one groove, through which the pins are pushed, one at a time, into the paper, the distances apart at which they are pushed into the paper by his machine, cannot be regulated by any such mechanical law. These distances therefore are dependent upon some other mechanical rule; upon some other mechanical organization. In Slocum's machine, these distances are regulated by one organization. In Crosby's machine they are regulated by another and different organization. In Slocum's machine, the distances apart of the grooves in the plate, control the manner in which the pins are placed in the paper. In Crosby's machine, an entirely different organization of the machine controls the manner in which the pins are placed in the paper.

Before the invention of Slocum, grooves or channels had been used, in which to place the pins, with the view to push them into paper, and they had been pushed in, in various ways. The grooves used by him as the channel to push the pins into the paper, were also used to separate the pins; as a channel to deposite the pins one by one in each groove, as they dropped from the hopper, when the hopper passes over the plate. Previous to his invention, the separation had been made by hand, and he invented a particular mode of separation, other than by hand, and set forth in his specification the particular means he used to produce the result. The plate with grooves as he described it, for separating the pins, he claimed for his invention. He also claimed the sliding hopper, which passed over the plate, and deposited a pin in each groove, as his invention. He also claimed the sliding plate or follower with the series of wires attached thereto, as described by him, in com-

bination with his groove-plate as described; and these also in combination with the sliding hopper as described. This is all he did claim. Grooves, as such merely, through which the pins were pushed into the paper he did not claim. The object of his machine was, to separate the pins, from a pile or mass of pins, and place them in channels at suitable distances apart, to be pushed into the paper, and then by means of the plate, with the series of wires attached as described, to push them into the paper.

The instrumentalities or substantial means, in Slocum's machine, by which the pins are separated from a pile or column, preparatory to being pushed in the paper, are a hopper, and a bed containing grooves of the exact size of the barrel of the pin. And to effect this separation, the hopper must either slide over the plate with grooves, or the grooved plate must slide or otherwise pass under the hopper. And to enable the pin to be separated, it must be in the hopper in a horizontal position, or nearly so.—The separation cannot be accomplished by that machine, unless the hopper slides over the plate, or the plate slides, or in some other way passes under the hopper. Without one of these operations, the machine, for this purpose is useless. One of these operations is essential to it. It is not a Slocum machine, for separating, without one of these operations.

Neither of these operations can be found, either in form or in substance, in the Crosby machine.—There is no hopper in Crosby's machine, unless the inclined channel-way, in which the pins hang by their heads, in a vertical position, be considered as a hopper. That if it be considered as a hopper, does not move. It is stationary. Of course, it neither slides nor passes over anything. From the lower extremity of the inclined channel-way, the pins are taken one by one, by the thread of a screw, while revolving, and while the pin is vertical, and by force of mechanical power, the pin is carried in the thread of the screw, to the other end of the screw, and there deposited by the screw, in a horizontal position in a groove-channel. The screw while operating, has no motion, but a revolving motion. During the whole time, it remains in the same space. It neither moves forward nor back. There is then nothing

in the machine which, either in form or in substance, has any resemblance or similitude to the sliding hopper, sliding or passing over the recesses of the plate to receive the pins, as they drop from the hopper, or recesses for receiving pins, sliding or passing under a hopper. While in Slocum's machine, one of these processes must take place. And without one of them, a machine for this purpose cannot be a Slocum machine.

In the Slocum machine the recess of the plate, which receives the pins separately from the hopper, must be of the exact size of the barrel of the pin. In the Crosby machine, the recesses in the thread of the screw, which receive the pins, and by which they are transported to the other end of the screw, and which it is claimed, are a mechanical equivalent for the recess in the plate, with grooves in Slocum's machine, need not be of the exact depth or breadth of the barrel of the pin. They may be of any size, provided they are not sufficiently large to enable the head of the pin to fall through. The essential means therefore used in Crosby's machine, to bring about the result, to wit, a separation of the pins from the pile or column, are substantially different from the means used in Slocum's machine, to produce the same result. In this respect the two machines operate differently, and depend upon distinct organizations. The same substantial means are not used in each.

The mode in which the pins are pushed into the paper by the defendants' machine, is by a punch applied to the head of the pins, after they are deposited by the screw in the grooved-channel, by which the pins are made, one by one to penetrate the paper, in and through the crimps. Slocum does not claim as his invention or discovery, the mode generally of pushing pins through a grooved-channel into paper, by means of a punch applied to the head of the pin. The state of the arts, as shown to exist prior to the time of his invention, shows that he could not with success have made any such claim. His claim is for his plate, with a series of wires attached in combination with the grooved plate, as described by him, by which combination, a row of pins is stuck by one operation. The mode therefore, adopted by the defendants in their machine, is not embraced in Slocum's claim. They have a

right therefore to use it, notwithstanding the patent granted to him. From the description already given of the Howe machine, and of the Crosby machines as exhibited on the trial, it appears manifest, that the mode of operation of one, as it respects the improvement or invention as claimed by Howe, is different from the mode of operation of the other. Howe's invention was but an alteration of the old English crimping bar, by the cutting of transverse notches through the bar, where the two jaws meet; to enable the pins to pass through these notches, and thereby stick the paper, while it was within the crimping jaws, and while it was being crimped. The notches or apertures of some kind were an essential means to effect the result, which Howe designed by his invention. Without them, his improvement did not exist. There are no notches or apertures, in Crosby's crimping rollers, and nothing which bears any resemblance or similitude to them. The pins are stuck, not when the paper is within the crimping jaws, but after it had passed out of them. The device of Crosby is essentially different from that of Howe. The pins are stuck by Howe's invention while the paper is within the crimping jaws, by means of notches or apertures in the crimping bars. No such means are used by Crosby. The principles of the two machines, in their modes of operation, and in the means used by each to effect the result accomplished are different. They are not therefore identical. One is not an infringement upon the other.

With this view of the case, the decree must be that the complainants' bill be dismissed with costs to the defendants.

In the above opinion Judge Nelson fully concurs.

New York Superior Court—Special Term, November, 1854.

MORRIS KETCHUM ET AL *vs.* THE BANK OF COMMERCE OF NEW YORK.

1. Where stock sold by an avowed owner, dealing as owner, turns out afterwards to be spurious and void, by reason of its having been illegally issued, the purchaser may recover back the price paid, though the seller was ignorant of his want of title.

2. A pledgee of stock on collateral security, with power to sell at public or private sale without notice, and to assign coupled with a blank power for that purpose, who has actually transferred the stock into his own name, stands as to third persons in the light of owner, though himself still subject, it seems, to the pledgor's right to redeem; and is therefore liable to an action by a purchaser from him for the price paid, in case the stock turns out spurious.
3. The principles which govern a common law partnership, are in general applicable to a Joint Stock Company, whether incorporated or not, except so far as modified by statute, or special rules of law. The introduction of new members into such association can, hence, be only authorized by joint consent; but this consent may be exercised either on each special occasion, or may be delegated to a particular, without power to redelegate it to an individual. The issue of certificates of stock in such association, being the introduction thereinto, of new partners, falls within this principle.
4. *Held* on the construction of the charter of the New York and New Haven Rail Road Company, that a resolution of the Board of Directors of that company, by which Robert Schuyler was appointed "transfer agent" of its certificates of stock, was a valid delegation of power, and that certificates of stock issued by Schuyler as such agent were binding on the Company.
5. The limitation of the amount of capital stock of the Company, in its charter, *held* not to prohibit the Board of Directors, nor their agent thus appointed, as regards third persons, from increasing the number of shares of stock, beyond the proportion between their par value and the capital stock.
6. The registration of certificates of stock in the books of the Company, though made a pre-requisite to the right of voting or of exercising any control in the management of the Company, is not necessary to a valid title in the stock itself; and and so the absence of a power to transfer will not affect the rights of a *bona fide* purchaser of a certificate of stock; he would thereby only become the equitable instead of the legal holder, but with the right to procure a transfer on the books of the Company.
7. Where a transfer agent appointed by the Directors of an Incorporated Joint Stock Company, has fraudulently over issued stock, a director taking such stock directly from the agent is chargeable with constructive notice, especially where the fraud would have been discoverable by an inspection of the books of the Company. But this does not apply, where he purchases from a *bona fide* holder; and query, whether such constructive notice would affect a firm of which the director was a member.

This action was brought to recover from the defendants the sum of $25,000, with interest, paid by the plaintiffs, upon a transfer of 370 shares of stock of the New York and New Haven Railroad Company. This stock had been pledged to the Bank of Commerce by the firm of R. & G. L. Schuyler. Various grounds for the de-

mand are set up in the complaint; but the main question depended upon the alleged illegality and valueless character of the stock, as having been fraudulently and falsely issued,

Messrs. *Ketchum* and *G. Wood*, for Plaintiffs.
Messrs. *Silliman* and *D. Lord*, for Defendants.

The opinion of the Court was delivered by

HOFFMAN, J.—The course adopted in adducing the evidence, and the arguments of counsels in this cause, have led to the consideration of the validity of the stock of the New York and New Haven Railroad Company, issued by the late transfer agent, to an amount exceeding one million seven hundred thousand dollars. I am now satisfied that the case cannot be decided without passing upon that question. I approach it with anxiety and distrust. The interests involved are of startling magnitude, and the questions grave and novel. An obscure and untrodden field is before me, and there are no lights kindled by the wisdom and labors of former judges to mark out the path. Such considerations urge me to a protracted and deliberate examination; but I shall fulfil a higher duty to the community by a prompt decision, which will speed the cause upon its way, for the matured determination of the general term of this Court. I shall consider the case under the following heads:—

1. The position and rights of the parties growing out of the presentment and refusal of the check for $10,000, and the ground assumed by the Bank of Commerce for such refusal.

2. The facts attending the possession and transfer of the securities held by the bank to the plaintiffs, and the nature and evidence of the apparent title to the 370 shares of stock made over to them.

3. The ground of the proposition of the defendants, that in point of fact the transfer made to the plaintiffs, did cover and represent undoubted stock.

4. Whether the action to recover back the price can be maintained upon the assumption, that the stock acquired was utterly void, and vested the plaintiffs with no right or interest whatever.

5. If such action can be maintained, then what are the true rights and position of the holders of such spurious or fabricated stock in relation to the company.

6. Whether the plaintiffs are chargeable with such notice of the character of the stock, as will vary any rights which innocent holders of spurious stock may possess.

1.—Upon the first point of examination the decision is in substance as follows: that no right attached to the plaintiffs by reason of the check of R. and G. L. Schuyler for $10,000, upon the deposit made after the presentment and refusal of payment of such check. That the right of the bank to retain the funds in deposit, accrued on the 3d of June, 1854, and could not be affected by a redemand of the check on the morning of the 1st of July.

That this right was not affected or impaired by reason of the stock notes given upon the loan by the bank being on demand, and that no express demand was proven; nor by the fact of the bank being in possession of the stock as collateral, as well as having the money in hand.

2.—Under the second head, the facts attending the possession and transfer of the securities to the plaintiffs, and the nature and extent of their apparent title to the three hundred and seventy shares of stock, the subject of the action, are stated at length; and are of great importance in determining the rights of the parties in this particular respect, but not necessarily so upon the general and great questions in this cause. A conclusion is, however, stated, that in no event could the plaintiffs recover, without allowing the bank to deduct the $10,000, the amount of the check paid upon arrangement. The principle of rescission, upon which the plaintiffs proceed, involves the principle of restitution.

The fourth subject of inquiry was, whether an action to recover the amount could be maintained upon the assumption that the stock acquired was utterly void, and vested the plaintiffs with no right or interest whatever. It is in the first place urged, that if this had been a sale of stock by an avowed owner, dealing as owner, no other warranty of title would have been implied than that the vouchers of stock were genuine and that the defendants were not cognizant of

any defect in the title. But in my opinion, this proposition cannot be maintained. It is admitted that the general rule, as stated by Chancellor Kent, is the law of our State; that if the seller is in possession of the article, and sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title; and the opinion of Justice Buller, in *Pasley* vs. *Freeman*, 8 T. R. 58, that if the seller affirms the chattel, which is not in his possession, to be his, he is bound to answer for the title, is approved of by Chancellor Kent as possessing both good sense and equity. In *McKey* vs. *Cocker*, 3 Barbour S. Ct. Rep. 326, Justice Parker critically examines the authorities and sustains the rule thus expressed. At this period in the progress of the law relating to trade and commerce, when the representatives of property or money, like certificates of stock, are so unboundedly dealt with as the property itself, I see no ground for a distinction between the possession of a certificate and the possession of a material chattel. Sir John Leach held that a bill might be sustained for the delivery of certificates of stock, because they were the evidences of a legal right, and necessary to constitute the party a proprietor. An action at law would not give the property, but merely a personal responsibility for damages recovered. *Doloret* vs. *Rothschild*, 1 Sim. & St., 590. The cases of *Morley* vs. *Attenborough*, Welsb., H, and Gordon, 3 Exch. Rep. 499, and *Chapman* vs. *Speller*, 14 Queen's Bench, R. 621, do not shake this proposition. The question in the former case related to a sale by a pawnbroker. Evidence of usage was introduced into the cause; besides, at the close of the opinion is the following language: "It may be, that though there is no implied warranty of the title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there is no implied warranty of title, some circumstances must be shown to enable the plaintiff to recover for money had and received. This case was not

made at the trial, and the only question is whether there is an implied warranty."

In *Chapman* vs. *Speller*, the question of warranty, or right to recover, on failure of title to what was contracted for, did not arise. This is the language of the Court. The party had bought only the right which the vendor had acquired at the sheriff's sale. That was merely the title and interest of the judgment-debtor. But the following important authorities are closely applicable to the present case, as now considered. *Jones* vs. *Ryde*, 5 Taunton, 488, was this: The defendants were bill brokers, and possessed of a navy bill, which purported to have been issued by the Navy Board, to have been registered on the 13th of July, 1813, and to be payable on the 15th of October, 1813, drawn on the Treasurer of the Navy, to Boll & Hobbs, on their order, for the sum of £1,884 16*s.* 10*d.* It seems that, on the face of the bill, the property tax was deducted, showing a result of £1,883 16*s.* 3*d.* The bill came into the hands of the defendants, who procured the plaintiffs to discount it, and received the avails. It appeared that the bill issued from the transport office, for £884 16*s.* 10*d.*, and before it was discounted, some person had altered it, by prefixing the figure 1 to the figures 884 and 883 in the several places in which they occurred, and prefixing the figure 1 to each of the dates of the 7th of July and 5th of October. All the parties were unconscious of the alterations. The true amount, however, had been paid by the navy office, and the present action was brought to recover the difference, about £1,000. The action was for money had and received, and was sustained. C. J. Gibbs observed: "Both parties were mistaken in the view they had of this navy bill; the one in representing it to be a navy bill of this description, viz., genuine; the other, in taking it as such. Upon its afterwards turning out that the bill, to a certain extent, was a forgery, we think he who took the money ought to refund it to the extent to which the bill is invalid. . . . In the present case, the navy bill is not such as it purported to be, and therefore the plaintiff is entitled to recover. A case somewhat similar very frequently occurs in practice, to which I should not refer as genuine law, but that it is said by my brother *Lens* to be

sanctioned on the authority of a case so decided at *nisi prius* by Mansfield, Ch. J., viz: where forged bank notes are taken. The party negotiating them is not, and does not profess to be, answerable that the Bank of England shall pay the notes; but he is answerable that the bills are such as they purport to be. In *Westropp* vs. *Solomon*, 8 Common Bench Rep. 345, the case, as far as the present question is concerned, was this: A share-broker and member of the Stock Exchange was employed to sell certain certificates of scrip of the Buckinghamshire, &c., Railroad Company. He sold the certificates, and handed over the proceeds to his employer. The certificates were found to be forged, and the broker, under certain rules of the Stock Exchange, was called upon, and paid to the purchaser a certain value as for genuine certificates, which exceeded the amount for which he had sold the scrip. For this amount he brought his action. The employer, under a count for money paid, deposited in Court the sum he had received as the avails of the sale. The question arose as to the excess which the broker had been compelled to pay. There was also a count as upon a promise that the certificates were genuine. It may be noticed that these regulations of the Board bound its members to compliance with a resolution like that in question, or to be expelled. It was held that there could be no recovery on the special count, there being no promise, express or implied, that the shares were genuine; that under the account for money received, the broker could only recover the amount paid by him to his employer, and that the resolution of the Board could not affect the latter so as to make him answerable for the excess. In delivering the opinion, Maule, J., says: "The defendant employed the plaintiff to sell these identical shares, who sold them according to that employment. The question is, what is the result of such a sale when the certificates turn out not to be genuine. There was no fraud or negligence on either side. The certificates were such as to deceive everybody who had anything to do with them. Still they were invalid. There cannot be a doubt, then, that the vendees would be entitled to recover back the money they had paid for them." Nothing has been cited, nor have I dis-

covered any authority sufficient, to overthrow or impair these cases. I cannot see why they do not determine the point now considered. Whether the offence is indictable as a forgery, has been doubted by able counsel, but we have the doctrine of Chief Justice Abbott, that a combination to fabricate shares of a company beyond the stipulated number, constitutes an offence punishable in a criminal way. *Rea* vs. *Mott*, 2 Carr. & Payne, 521.

It is next urged on behalf of the defendants, that they were never owners; never affirmed themselves to be owners, nor dealt as such in relation to this stock, but that throughout, they negotiated as pledgees, acted as pledgees, and transferred the stock in that capacity, and in no other; that they looked throughout to the Messrs. Schuyler, the true owners, for every authorization and source of their acts, and obeyed their directions, and assigned nothing, and professed to assign nothing, but the mere interest of pledgees, which, on the requisition of the firm, they were absolutely bound to do. I have been greatly pressed with the argument, of which this is a brief summary; but, after much consideration, I think it is not conclusive. In the first place, it is to be remembered that the cashier, on the day of the known insolvency of the firm, (the 30th of June,) attempted to have a transfer of the stock made to the president of the bank, and would have procured it, had he applied a few minutes earlier. In the next place, he did effect the transfer on the morning of the 1st of July, before 11 o'clock, from his own name to that of the president, and received the new certificate about 12 o'clock, for 370 shares, having surrendered the two of 200 and 170 respectively. Again, the order of the firm authorized an assignment of the securities, and the arrangement was consummated by a delivery of the new stock certificate, with a blank power to the plaintiffs to transfer, signed by the president. The law, in respect to the sale of stock pledged, I take now to be, that the party, after default, may sell it at auction upon reasonable notice of the time and place, to the owner. If any other mode is provided in the contract, that will govern. *Brown* vs. *Howard*, Superior Court, T. R., 497. In both of the notes in question, the agreement is, that the stock may be sold at the board of brokers, or at public or private sale, at the option of the bank, and

without notice. I have had occasion to see several printed forms, in which the provision for a sale is the same. Although such a clause would, I think, be construed to mean a sale to a third person, yet there can be no legal objection to the pledgee of stock placing himself, under his power, precisely in the position of a mortgagee of land, who takes possession. I speak of the general law, not as affected by our statute. If so, the pledgee holds the stock, as owner, against every one but the pledgor, or those under him, who may have a right to redeem—a right to be enforced by calling for the transfer of an equal number of shares. The bank, in this case, did not exercise its power to sell at public sale, or at the board of brokers. But it is another question, whether it did not exercise the power of selling, at private sale, without notice, when it first caused the transfer to be made, which vested it with every recognized indication and evidence of ownership, and then transferred the stock to the plaintiffs. Again, the reason of allowing a recovery in cases like these, is, that money was paid for what was deemed an existing right, and when it is proven to have no existence, the party receiving ought not to retain it. Now, whether he got the money as pledgee or owner, does not appear to be of material consequence in such an aspect of the question. In the case of *Fatman* vs. *Loback*, 1 Duer Rep. 354, the Superior Court treat the filling up a blank power attached to a certificate of stock, and delivering them to another, as a conversion of a previous equitable title into a legal one; and they held that, whether this was done for the purpose of selling or hypothecating, made no difference as to the rights of a subsequent holder. I conclude that this action would lie to recover back the sum paid, deducting the $10,000, upon the assumption of the stock transferred being proven to be void and valueless.

5.—This consideration leads me inevitably to the question as to what are the rights and position of the holders of such fabricated stock, in relation to the company. I have before stated that as to the shares in question, they are plainly portions of this stock, whatever obscurity may attend the tracing of the rest. I cannot but add my fixed conviction that a vast mass of the disputed stock can be fol-

lowed and identified, and I believe that, could a competent tribunal prescribe some few and reasonable rules of appropriation and adjustment, the task would not transcend the power of mercantile ability to mark the whole. But it is enough in this instance, that I find these shares stamped clearly and indelibly with the sign of their birth in a fraud and fabrication. Is the railroad company and its innocent stockholders bound for these shares? and, if so, what is the nature and extent of their liability? These are inquiries which have stirred the mind of the commercial community, in a degree rarely known in this country, and which have evoked the exercise of the highest professional ability and learning in this, and our sister State of Connecticut, to meet and to solve them. It is unnecessary to enter upon that wide field of investigation, into the origin and nature of corporations, and the extent of their powers, over which the learning and reasoning of the able counsel would lead me. It is sufficient to say that the rules governing the ancient municipal corporations of cities and towns, can shed but little light upon a question like the present. Such corporations had originally their rise in the principle of protection of life and property, from the barons and kings, and watch and ward was the duty of the burghers, and the bond of their safety. Particular franchises were successively won, from fear or favor. They were all inroads upon feudalism, and were all personal and peculiar privileges. *Rise and Progress of Cities; Smith's Wealth of Nations*, vol. 3, page 171, et seq. But when the increase of trade and commerce led to an appreciation of the value of a combination of capital and effort—"when men, having learned what wonders could be accomplished by union, began to think that union was competent for everything"—(Dr. Channing)—the formation of partnerships began. Joint stock associations followed. The principle was at first a mere extension of the essential elements of a partnership to a greater number of members, with some variations of government. But the perils of personal responsibility to the members, and the unwieldly machinery of such a body, led to application to the State to give them the protection of an incorporation. Through all the judgments of courts, based upon the doctrines of the common law—

through all the legislation of England, and of our own and other States, applicable to associations incorporated or otherwise, we find the great principles of a partnership recognized, changed indeed, modified, or impaired, but still pervading and discernible. Confining the inquiry to the most affluent fountain of our law—the law of England—we find that joint stock associations were known before the act of 1719, called the Bubble act; and they were based upon the principle of partnership, with an attempt to make shares transferable, and to limit the personal responsibility of members. That statute recognized the existence of such companies, and speaks of their mischievous consequences—that they have attempted to act as corporate bodies, pretending to make their shares in stock transferable, without legal authority by statute or charter from the crown. The act then provided that all such undertakings and attempts were void and illegal, and especially the acting, or presuming to act, as a corporate body, the raising, or pretending to raise, transferable stock or stocks, or to assign any share, without authority. By section 25th, the act was not to restrain the carrying on of any home or foreign trade in partnership, in such a manner as had been usually done, or might be done according to law. The transferability of shares, unrestricted and unregulated, was a blow at the accountability of every member of a partnership, by rendering the tracing of debtors difficult, and sometimes impossible to the creditor. Such a power was, therefore, reserved for the parliament or the crown. After the act, however, the effort was perpetually made to engraft this principle upon the schemes of joint stock associations, and no less strenuously was it attempted to limit the personal responsibility of the members to the amount subscribed, and exempt them from the demand of creditors. But the courts of justice invariably defeated these attempts, and fixed upon these joint stock companies every material attribute of a common law partnership, in the non-assignability of shares, and the absolute personal liability of members. The expression of Lord Eldon was but the echo of a multitude of decisions, that the wealthiest noblemen in the land might be involved to his last acre, and his last shilling, by a connection with such a company. In the year 1825, by the Act of 6 Geo. 4

cap. 91, the Bubble act was repealed, and, for the first time that I am aware of, it was provided "That in any other charter thereafter to be granted by his Majesty, it should be lawful to provide that the members of such corporation should be individually liable in their persons and property, for the debts, contracts and engagements of such corporation, to such extent as his majesty might deem fit and declare." It is sufficient to notice here the policy of our own State, exhibited in the manufacturing statute of March, 1811, and found now in the constitution itself, in regard to banking incorporations. The personal responsibility of the members was recognized, although limited to the amount of their respective shares of stock. Sess. 34, ch. 37, Constitution of 1846, art. 8, sec. 7. From the earliest judicial decision in our State to the present time, companies organized under this act, have been spoken of as mere partnerships, with some of the privileges and powers of corporations. *Slee* vs. *Bloom*, 19 Johnson, 473; *Bridges* vs. *Penniman*, Hopkins, 304.

This view has been followed in a multitude of subsequent decisions upon the same or similar statutes. It is sufficient to refer to *Hargon* vs. *M'Culloh*, 2 Denio, 119, which contains reference to many of them. In these statutes the right of transferring shares was given, and the mode left to the by-laws of the company; and in the general railroad act of our State (Laws of 1850, ch. 140), the points of assignability and personal liability are regulated. By the eighth section, the stock may be transferred in the manner prescribed by the by-laws of the company, but no shares are transferable until all the calls have been fully paid in. By the tenth section, each stockholder is made individually liable to the creditors to an amount equal to the amount unpaid on the stock held by him for all debts, until he shall have paid up the whole amount due by him to the company; and all are made jointly and severally liable for debts to servants and laborers for services performed to the corporation, but after an execution against the company has been returned unsatisfied. The want of the attribute of transferability in shares of stock was a consequence of the policy of the English law, founded upon the principle of partnership. The attempt of joint stock associations

to render shares assignable, was denounced by the law, because it violated that principle; and the Legislature clothed companies with the power in opposition to the partnership law, and in doing so imposed certain restrictions and provisions, such as public registrations of the transfer, to obviate as far as possible the evils which dictated the common law rule. Details of the provisions upon this subject in some of the English acts may be found in the case of the *Cheltenham R. R. Comp.* vs *Daniels*, 2 R. R. and Canal Cas. 728, and in *Hebblewhite* vs. *McMorin*, ib. 51. Still through the whole stream of authority and principle in relation to illegal companies or companies privilege with an act of incorporation, the doctrine of partnership is visible. The former were unauthorized, and the latter statutory partnerships; but the basis of the association was the same. Thus in the case of *Ashby* vs. *Blackwell*, 2 Eden's Rep., 299, a case of important bearing upon most of the questions here, the plaintiff was possessed of £1,000 Melthian Bank stock, and employed John Price, a broker, to receive the dividends for her. Price forged a power of attorney from her, empowering him to sell the stock, which he did to the defendant Blackwell, and the stock was transferred to the latter on the books of the company. The bill was brought for a re-transfer of the stock or satisfaction from the trustees of the Melthian Bank. It was agreed that the plaintiffs were entitled to relief, and the question was whether Blackwell or the bank should bear the loss. A case was made of great carelessness on the part of the secretary, in receiving the forged power which was not authenticated as the by-laws of the company required. The lord keeper held that a trustee, whether a private person or body corporate, must see to the reality of the authority empowering them to dispose of the trust money; for if the transfer is made without the authority of the owner, the act is a nullity, and in consideration of law and equity, the rights remain as before. That as to Blackwell, he thought it was not incumbent upon him to inquire into the letter of attorney, because the letter of attorney in that and similar cases, was no part of the purchaser's title. The title was the admission into the company as a partner *pro tanto*, he accepting the stock on the condition of the partnership. The

letter of attorney is only the authority to the company to transfer. The company ought to answer for their servants' negligence. He decreed, that the stock be replaced in the name of the plaintiff, and that the bank pay Blackwell the amount he had paid upon the transfer, with interest. So, in *Bryant* vs. *the Warwick Canal Co.*, 23 Eng. L. and Eq. Rep. 91, Dec. 1853, a bill was filed by a shareholder on behalf of himself and all others, &c., to recover money paid into a company provisionally registered and then abandoned, although an official manager had been appointed. The bill was sustained upon the ground of an ordinary partnership right. So, in *Stevens* vs. *The South Devon Railroad Company*, 12 Eng. L. and Eq. Rep. 229, the principle of partnership was applied on a very important and complicated case, where a clause in a statute bearing upon the question was held directory, and the subject was considered one of internal management in which a majority of partners will decide. And so, in *Couro* vs. *The Fort Henry Iron Works*, 12 Barbour, 27, the Court say, "The tendency of modern decisions is to assimilate the action, duties and liabilities of corporations, to those of individuals and commercial partnerships." But the power to assign shares was a power to introduce new members into the partnership. The assignee was substituted for the assignor, in whole or in part, accordingly as the whole or a part of his shares was transferred. The holder of ten shares could introduce ten new partners in his place. True, they represented separately, what he represented in the aggregate; the representation collectively being of the same shares; but yet new partners were brought in by the will of one party alone. The general system adopted in unchartered companies, was to require a subscription to the deed of agreement or settlement. But while this was essential to constitute members among the associates, much less was sufficient to render a person responsible to creditors. And the very rule and distinction between the parties *inter se*, and to the world, was applied to these cases. See Wordsworth 182, *Maudsley* vs. *Le Blanc*, 2 Carr. & P. 409 n.; *Harvey* vs. *Kay*, 9 B. & C. 356, and *Ellis* vs. *Smœck*, 5 Bing. 521. Next, it cannot be contested that if a company was chartered with a definite limited capi-

tal, and nothing was declared respecting the amount of the shares, the company could adjust them at pleasure; and could give that power to the managers or directors. It is equally clear that the shareholders could authorize the directors to increase the number of such shares; and, if this could not be done by transcending the limit of the capital and adding to it, it must be understood as authorized to be done by diminishing the value of the shares. Cases can be imagined; cases, I understand, have occurred where such a method of raising money to meet the exigencies of a corporation, has been restored to. It will not do to say, that it cannot be imagined the stockholders intended to give a power, the effect of which would be to diminish their own profit. Such an answer might be made by a principal in every case of excess of authority. A joint stock company or a corporation then, if unfettered by express legislation, has an undoubted right to fix the number of shares into which the capital shall be divided, and when fixed, the associates may subsequently change it; and, if the power is reserved or implied in the articles of association, the directors or trustees may exercise such power. Thus, in the *Armsgate Railroad Company* vs. *Mitchell*, 6 Railway and Canal Cases, 236, the shares of a company were originally fixed at £25 a share, and, by a vote of the directors, were reduced to £20 a share. It was held that this was lawfully done. The statute under which it was organized, did not forbid it. A section of that act prevented any one from being entitled to vote except he possessed an interest in the capital to the amount of £25. It was also held that, under the charter the directors had the power. The *Lexington Railroad Company* vs. *Chambers*, 13 Metcalf, 110, and the *Kennebec Railroad Company* vs. *Jarvis*, 34 Maine Rep. 360, tend to support the same position. I repeat and condense these propositions, thus: The principles of a common law partnership govern joint stock associations, incorporated or unincorporated, except so far as modified by the statute, or fixed principles of law. The introduction of new members into a partnership, is, upon common law doctrine, only allowable upon a joint consent. This joint consent may be exercised and proven, either by an actual agreement in each particular instance, or by a delegation of the power

to assent, to a particular body, or to a particular person. If the delegation is made to a particular body, it may be accompanied, or not, with authority to that body to re-delegate it; and thus the question is first, whether the members entrusted the power directly to a particular officer; and next, if they did not, whether they entrusted it to a class of persons, with power of substitution; and lastly, have the latter made such substitution?

Now, if by a regular chain of devolved power, the authority to introduce new members into this partnership can be established, if by the act and agreement of the stockholders, the evidences of such membership are placed in the power of an officer to authenticate and issue, then a general power or agency has been delegated to him. And then his abuse or fraudulent exercise of that power will not prevent the company from being bound. This view meets the cogent argument of Mr. Wood, upon the nature of the agency in this case. What was the power delegated to Robert Schuyler, as transfer agent, and what was its extent? The first section of the charter passed 1st May, 1844, constituted Joseph E. Sheffield and others, naming them, "with such other persons as shall associate with them for that purpose, a body politic and corporate, by the name of the New York and New Haven Railroad Company." The second section provided that the capital stock should be two millions of dollars, with the privilege of increasing the same to three millions, and to be divided into shares of one hundred dollars each, which shall be deemed personal property, and be transferred in such manner, and at such places, as the by-laws of the company shall direct. By the third section, the parties who were authorized to receive subscriptions might make twenty thousand shares subscribed the capital stock of the company. But if the subscription exceeded thirty thousand, the same were to be reduced and apportioned in such manner as should be deemed most beneficial to the corporation. Under the fourth section, the immediate government and direction of the affairs of the company was vested in a board of nine directors to be chosen by the stockholders. Four of such directors formed a quorum for the transaction of business. By the seventh section, the directors were vested with the power to make by-laws and regu-

lations touching the disposition and management of the stock, property, and estate of the company, not contrary to the charter, or the laws of the State or of the United States; the transfer of shares; the duties and conduct of their officers and their servants; and all matters whatsoever, which may appertain to the concerns of such company." By the twentieth section, the act might be amended, altered or repealed at the pleasure of the General Assembly. In the exercise of the powers conferred by the charter a resolution was adopted by the stockholders to the following effect—(Book of Records, Nos. 20 and 21):—"Transfer and Certificates of Stock—The principal transfer office shall be in the city of New Haven, but transfer agencies may be established in the cities of New York and Boston, by resolution of the board of directors; and all transfers of stock at any office shall be made under, and in compliance with such rules and regulations, and by such instruments of assignment and transfer (which need not be under seal) as may from time to time be made, ordered and appointed by the Board of Directors. "Certificates of stock shall be in such form and issued under such rules and regulations as the Board of Directors may from time to time appoint and direct." The directors adopted the forms of transfers, certificates, and blank powers of transfer, and ordered their general use. On the 3d of February, 1847, the following resolution was adopted by the directors: "The receipts and certificates of stock on the books at New Haven, to be signed by J. E. Sheffield, as transfer agent; at Boston to be signed by J. E. Thayer & Brother, as transfer agents; at New York to be signed by Robert Schuyler, as transfer agent." Now, a certificate of stock is a written declaration that the party in whose favor it runs, is entitled to the shares expressed in it. It is a written admission that such person is a member of the company. The company is a partnership, except as expressly qualified. The certificate is, therefore, an admission that the person named is a partner. Did there then come down from the whole body of associates (the stockholders in this company), a power to Robert Schuyler to declare that the person mentioned in such certificate was a member? It seems to me that the affirmative is made out by the series of acts and resolutions I

have stated. I do not see what link in this chain can be broken. Grant this, and the first part of Mr. Wood's powerful argument is overthrown. That was in substance, this: You cannot, by any rational deduction, imply a power in an agent to do that which it was totally out of the power of the principal to perform. Yet more strongly—you cannot imply such power, when the principal was prohibited by the express law of the State from doing the act, and it was a violation of public policy and public law to do it.

The first proposition of this argument is met by what is above stated. Irrespective of statutory prohibition, there was a power in the company to admit new members, and that power had been delegated to Robert Schuyler. And then we are led to the next position of the learned counsel. Does the charter or statute law prohibit the act? It is perfectly clear that when the Legislature has prescribed a limit to the capital of a corporation, a direct increase of the amount would be a violation of the compact, and a ground of forfeiture. In granting corporate privileges, the regulation of the capital is governed by two considerations—the necessity of raising an amount sufficient to accomplish the public object, and the forbidding a larger accumulation of money or property in the hands of one body than is essential for that purpose. For a company then to transcend the fixed amount is to usurp a right to increase the great element of corporate power, contrary to a fundamental policy of the State. But it is not seen how this line of reasoning applies with the like or with any force to the increase by a company of the number of its shares, in any manner which leaves the capital precisely as it was before. If as before observed, the charter of a company had fixed a capital, but was silent as to the number or par value of shares, the company (or its agents if entrusted with the power) might adjust and readjust such number or value. If, again, when the charter, as in this case, directs that there shall be a defined number of shares of $100 each, the associates had agreed to increase the shares by reducing the par value of what they held by a given per centage, would that be a violation of the charter such as to work a forfeiture, or would it be a matter only affecting the individual members as to their pecuniary interests in the stock?

We find that under the present charter, there might have been thirty thousand members of the company. It is not easy to see what great rule of public policy is invaded if this number was voluntarily increased to forty thousand, the limited capital remaining the same. The effect in the case suggested would be that each stockholder would reduce his share, for which he has paid $100, to $75, and receive his part of future profits upon the latter sum. But it is here necessary to examine with care a decision of the Supreme Court of Massachusetts, pronounced by its late distinguished chief justice, bearing upon this point. The case is that of the *Salem Mill Dam* vs. *Ropes*, 6 Pickering 32, reaffirmed in 9 Pickering 187, and confirmed in 10 Pickering 147. It must be noticed that this case arose upon an action against a subscriber for payment of a call, which was resisted on the ground that his subscription was conditional, and that such condition had not been fulfilled. The charter was that the capital should be $500,000, and the shares 5,000, of $100 each. The directors had attempted to go on with the business of the company when only 2,687 shares had been subscribed. The Court held the defendant not responsible for the call, and the line of reasoning was in substance this: A subscriber has a right to the benefit of the expectation and possibility that the whole of the capital allowed by the charter may not be necessary for the object contemplated. If, then, when the capital is $500,000, and the shares 5,000 and each share of course $100, should it occur that $250,000 will suffice for the object, a subscriber for one hundred shares will only be called on to pay $5,000, or $50 a share. But if the shares are reduced in number to 2,500, each subscriber for 100 shares must pay $10,000, or his utmost limit. This would be against the condition of his subscription. Again, every subscriber has a right to calculate upon a fund computed to be commensurate with the object, and that each of the 5,000 shares should be liable to a tax of $100, to produce that effect. A power to reduce the shares to 1,000, without a power of taxing them beyond the $100, would be a power to expend $100,000, which might be totally insufficient, and might be wholly wasted and lost.

Now, it appears to me that it is inaccurate to say that these

cases prove that a reduction of the number of shares expressed in a charter, is a violation of that charter. It is correct to say that they prove that it is a violation or non-fulfilment of a condition in the contract, between a subscriber and the company, the terms of which contracts are found in the charter. Then the condition of the contract may be waived, modified, or insisted upon, at the will of the subscriber, with the assent of the company. And hence we are, in each particular case, to ascertain whether such was a condition of the contract, and whether, if it was, it has been waived. In this point of view the question was regarded by the Court, in the case of *Lexington and W. Cambridge Co.* vs. *Chambers*, 13 Metcalf, 311, and in the *Kennebec Railroad Co.* vs. *Jarvis*, 34 Maine Rep. 360. In the last case the Court says, that the contract there could not have had reference to any certain number of shares or certain amount of capital, as fixed by the charter, and there is no language used in the contract prescribing the number of shares, or the amount of the capital. It may be admitted that an increase of the number of shares, by a reduction of the value of those already issued, by affecting the amount of the profits of the holders as well as the actual sum represented, stands upon a similar footing as a reduction of shares which tends to increase his liability or endanger his advance. But the question still, in each instance, is one of contract and authorization. Upon this question of forfeiture of the charter, I have examined the following cases, and the result, in my judgment, is, that it is at least very doubtful whether the tribunals of Connecticut, would determine this charter to be forfeited by the adoption of this stock as part of the stock of the company, by reducing the value of the genuine shares in the manner pointed out. *Kellogg* vs. *The Union Co.*, 12 Conn. Rep. 7; *The State* vs. *The Essex Bank*, 8 Vermont Rep. 489; *Planters' Bank* vs. *The Bank of Alexandria*, 10 Gill & John. 346; *Attorney General* vs. *The Petersburg Railroad Co.*, 6 Iredell, 456; *The People* vs. *Oakland County Bank*, 1 Douglass, 282; *State of Mississippi* vs. *The Commercial Bank of Manchester*, 6 Smedes & Marshall, 233. See also the cases in this State, cited in Angell & Ames, sec. 776, note. There remains one point on this branch of the

case, to which the observations of counsel have been to some extent directed, and that is as to the effect of the possession of a certificate merely, with or without a power to transfer annexed to or accompanying it.

It is conceded, as a rule very general in its extent, that for the purpose of voting, or exercising any control in the management of the affairs of such companies, a registration on the books is necessary. Regulations of this nature are sometimes contained in the charter—sometimes prescribed in by-laws, and in our State directed by express statute as to various incorporations. It is sufficient here to refer to the general statute as to moneyed corporations,–(2 R. S., 596, §36, 37 and 38,) and the general Railroad act adopting them, (Laws of 1850, ch. 140, § 5) and to the case of *Rosevelt* vs. *Brown*—1 Kernan's Court of Appeals, 152. Again, as a general rule, it may be stated that such registration is essential to release an apparent owner from responsibility to the calls or debts of the company. *Sayles* vs. *Blanc* 14 Queen's B. Rep. 205; *Wynne* vs. *Price* 3 De Gex & Smales, 310; *Adderly* vs. *Storms*, 6 Hill, 626; *Worrall* vs. *Judson*, 5 Barbour's Rep. 210. A certificate of the ownership of shares issued to a registered party, is, in truth, an evidence and declaration of a right of property to the shares expressed in it. The power to transfer, which may be annexed to it is immaterial as to the party's own title. It serves the office of enabling him to invest another party with his own absolute right of property and to obtain his recognition by the company as such. It serves the purpose of enabling such person to transfer the same right and interest to another, and so successively. But this can be accomplished by any instrument of assignment, and, indeed, by a mere endorsement on the certificate—*Commercial Bank of Buffalo* vs. *Kartright*, 22 Wendell, 362—that the certificate is the substantial ground and evidence of title and interest; and the power to transfer but an adjunct will, I think, appear from the following decisions.

In *Doloret* vs. *Rothschild*, 1 Sim. & St. 590, a bill was sustained for the delivery of certificates of stock in a loan, for which the plaintiff had subscribed. In ex parte *Barriere*, 11 Eng. L. & Eq. R. 128, a party who took a certificate of stock without complying

with a by-law requiring registration, was held responsible. In *Newry R. R. Co.* vs. *Edwards*, 2 Exch. Rep. 118, a person under similar circumstances was considered a shareholder from mere possession of the scrip. In *Cheltenham R. W. Co.* vs. *Daniel*, 2 Railway Cases 728, and *The same* vs. *Medina*, ibid 735 the purchaser of scrip certificates who sought to get himself registered, but accidentally failed, was held to be a member. In *Bagshaw* vs. *The Eastern R. W. Co.*, 6 Railw. and Canal Cases, 152, 166, Chancellor Wigram stated it as an indisputable proposition that the holders of scrip certificates in the stock of a company could sustain a bill to prevent the misapplication of the capital. There was an inchoate right in such persons to become general shareholders. In ——vs. *The Marblehead Co.* 10 Mass. Rep. 476, the delivery of a certificate with an endorsement upon it for valuable consideration, was held sufficient, and entitled the holder to the interest and title when the calls were paid in full. In *Ashley* vs. *Blackwell*, 2 Eden Rep. 300, where it was held that a company was responsible to a party whose stock had been transferred under a forged power, the lord keeper said that the letter of attorney was no part of the title, but only an authority to transfer. The title was an admission into the company as a partner *pro tanto*, he accepting the stock on the conditions of the partnership. The letter of the attorney is only the authority to the company to transfer. And in *Fatman* vs. *Loback*, 1 Duer Rep. 354, this Court held that the holder of a certificate, with a power annexed in blank, could retain the securities for moneys advanced to the first pledgee of the stock, although the owner had paid such pledgee in full. The possession of the documents gave the pledgee an equitable title, which, by filling up the power, he could convert into a legal one. Indeed, it seems difficult to avoid the conclusion that, as between immediate parties, a mere delivery of a certificate as security upon obtaining a loan of money, would be an equitable pledge of the stock, equivalent to an equitable mortgage by a deposit of a loan. See *Russel* vs. *Russel*, 1 Br. C. C. 209; *Moore* vs. *Choat*, 8 Sim. 508; *Welsh* vs. *Usher*, 2 Hill Ch. Ca. 170.

It follows that the holders of certificates, even as I think, without powers of transfer, are equitably shareholders or members of this com-

pany, with a right to authenticate their title by procuring a transfer on the books. If they do not possess a power of transfer, it will only be a difficulty of evidence to make out their right. The result then is that the plaintiffs are entitled, under the certificate and power taken by them from Mr. Stevens, the President of the company, to be admitted as shareholders in the capital of this company in common with all other shareholders whose rights are admitted or shall be admitted, and that their right is in proportion to such whole number of holders allotted upon a capital of three million of dollars.

It will be seen that this view of the rights of the parties excludes any right to sue for damages or to sustain any action except upon the ground of common ownership, unless indeed the company refuse admission. Whether in such a case a suit for damages, or a mandamus, is proper, I do not consider. Since this opinion was written I have been referred to the case of exparte Hassinger, 2 Ashmead, 287. That case is strikingly in point, and the line of reasoning, in several particulars, similar to that I have pursued.

6.—The last subject of consideration raised by the counsel is, whether these plaintiffs are not so far chargeable with notice of the character of this stock, as that upon that ground alone they must fail in this action. It appears that Mr. Ketchum, one of the plaintiffs, was a director and officer of the company at the time of the fraudulent entry of the stock, and since; and it is insisted that he was bound to know the operations of the company, the position of the books, and that his knowledge is that of the firm. It is, as I understand, admitted that he was a stockholder. The general law which I have treated as applicable to this case, gives every partner an equal right to the control and inspection of the books, and charges every partner with a knowledge of their contents. Besides, this right belongs to every corporator by settled rules of law. *Rex* vs. *Shelly*, 3 T. R. 142; *Rex* vs. *Travanion*, 2 Chitty's R. 366 *n*; *Rex* vs. *Tower*, 4 M. & S. 162. Again by an act passed April 11, 1842. Sess. laws, 1842, Ch. 165, the transfer agent in this State, of any moneyed or other corporation existing beyond the jurisdiction of this state, shall, at all reasonable times during the hours of transacting business, exhibit to any stockholder of such foreign cor-

poration, when requested by him, the transfer books of such foreign corporation, and also a list of the stockholders thereof if in their power so to do. The second section imposes a penalty of $250 for a refusal to make such exhibition. It will not escape attention, that the fraud in the present case was of the most apparent and glaring character. On the face of the stock ledger, stood two entries of the enormous extent of 5,000 shares each; transferring those amounts from the transfer agent substantially to himself. And on the page of the ledger referred to in this entry, in the bald debit of 10,000 shares in two items, to the transfer agent. There never was a case of more flagrant neglect of all the accessible means of information than on the part of a director taking stock directly from R. & G. L. Schuyler. When such a case arises, it will be difficult to avoid the application of the rule which places a party who has knowledge of a fraud, or the path to knowledge of a fraud, plainly before him, in the same position as the criminal himself. In the language of a judge, who, at least, never left a decision or a proposition obscure, "It will be no public detriment if my decree tends to make the directors of public companies attend to the business of those companies, and teaches them not to leave the important transactions of millions to undirected clerks and book-keepers." (Lord Noythington, 2 Eden, 303.) If the consequences of the neglect fall upon the director, instead of the company, in the loss of his own demand, the rule will be yet more equitable in its application than it was in the case before the lord keeper.

I do not propose to inquire under what if any circumstances, a stockholder of the company, not a director, may be subject to a similar imputation of constructive notice. The field is wide and the cases numerous, upon the question of what shall be sufficient to affect the conscience of a purchaser with the consequences of the fraud of his seller. In the present case it may be doubtful whether the firm is bound by the constructive knowledge of a member chargeable upon him as director; but in the next place, the plaintiffs are entitled to shelter themselves under the want of notice, implied or actual in the bank. It does not appear that the bank, in its corporate capacity, or that any of its officers on its behalf, held stock, so as to

entitle it to examine the books. I have thus endeavored to discharge my duty in a case more serious and important than any other which it has been my lot to determine. No one can be more conscious than myself of my own inability to meet its difficulties and dissipate its darkness. No one could bestow more anxious thought and solicitude to decide it righteously. I humbly trust that the hope which I have imbibed from the source of all truth and peace may be realized, and that this fierce struggle may end like the contest for the wells of springing water between the servants of Isaac and the herdmen of Gerar, when the stream of the fountain of Rehoboth and the fruitfulness of the land followed and rewarded the submission of the patriarch.

The complaint must be dismissed with costs.

In the Supreme Court of Pennsylvania.

CADWALADER *vs.* MONTGOMERY.

Moroney's Appeal.

A mortgage in the common form was given to secure moneys covenanted to be advanced as buildings upon the premises progressed, *held*, per BLACK, C. J., LEWIS and LOWRY, JJ.; WOODWARD & KNOX, JJ. *dissentienibus*—

1. That the instrument by which the terms of the loan was regulated, need not be recorded.
2. That the mortgage had priority of lien over the claims of mechanics, from the date of its record, and not from the dates of its actual advance.
3. The agreement that the money should be appropriated towards paying for materials and workmanship, neither postponed the mortgage nor required the mortgagee to see to the application of the money.

From the District Court of Philadelphia.

These were appeals from the distribution of a Sheriff's Sale.

On the 7th of August, 1849, Cadwalader conveyed to Montgomery by several deeds sixteen lots, each fronting on Wood and Carlton streets, in the City of Philadelphia, reserving ground rents, which were the consideration for the grants.

On the same day, Montgomery mortgaged the premises to Cad-

walader by several deeds, to secure bonds conditioned for the payment of the aggregate sum of $12,000.

These bonds and mortgages were in the common form, and payable in one year, and they were recorded on the same day. Within one week Montgomery commenced the erection of houses on all of these lots, and the premises having been sold under Cadwalader's mortgages, his right to be paid out of the fund was disputed by mechanics who had furnished materials, and whose liens related to the commencement of the buildings.

It was proved that no money was actually loaned at the time the mortgages were given, but the consideration was an agreement of the same date between Cadwalader and Montgomery, under seal, whereby Montgomery agreed to erect thirty-two houses on the lots, and Cadwalader agreed to advance to Montgomery, "to be appropriated towards paying for materials and workmanship for the said buildings, $750 on the houses to be built on each lot." These payments were to be made by instalments of $100 at different stages of the progress of the work, and $800 when the houses were finished and release of liens signed. By this instrument it was declared that these moneys were to be secured by the bonds and mortgages above mentioned.

This instrument was neither recorded nor in any way referred to in the mortgage deeds or bonds.

The first payment by Cadwalader was on the 18th of August, after the work was commenced and the liens of the mechanics had attached.

The last instalment of the $12,000 was paid November 5th.

These payments were made without particular reference to the progress of the work, in part to enable Montgomery to purchase materials for cash, and a large part of it directly to material men on Montgomery's orders. Montgomery was himself the builder, and did the carpenter work.

The balance due from the Sheriff's sale was less than $10,000 after deducting expenses, and the question was whether the mortgages had priority from their date of record over mechanics' liens and judgment creditors of Montgomery, whose liens attached before actual payment of the money.

Another question was also discussed in the Court below, whether it was competent for the mortgagee to object to the validity of mechanics' liens, after judgment had been recovered upon them. The judgments having been entered, after all the advances had been made on the mortgages, but the claims filed were relied on, to show liens existing prior to the advances.

These liens were, however, decided in *Taylor* vs. *Montgomery*, in the Supreme Court, to be well filed.

A demand for an issue was made, and exceptions filed to the Auditor's report, awarding the proceeds of sale to the mortgagee.

April 24.—SHARSWOOD, P. J. delivered the opinion of the District Court.

As the question presented is one of mere law, we see no reason for sending the case to a jury, if the law be with the plaintiff. Unless the mortgage be totally void as against lien creditors, assuming that no advance had actually been made upon it before the building was commenced, the plaintiff has a right to proceed, and we have no right to delay him, more especially as the terre-tenant not being a party to the scire facias on the mortgage, will not be precluded from taking defence in an action of ejectment by the sheriff's vendee. That a mortgage to secure future advances is good between the parties, nobody disputes; and it is equally well settled that such a mortgage is not available against subsequent incumbrances, except to the extent of what may have been actually advanced at the date of the respective subsequent incumbrances. The reason is that the mortgagee, before making each advance, is affected by the constructive notice of such subsequent incumbrances afforded by the record.

If he made the advance after such notice, it was at his peril. But how, when the mortgagee is bound by covenant to make certain specified advances?

Notice of subsequent incumbrances will afford no defence to an action on the covenant. He will be bound notwithstanding such incumbrances. Cannot, then, a man who has bound himself by a legal obligation to pay a certain sum of money for another at a day certain, secure himself by a mortgage for that sum, which will be available, from the date of its recording, against future liens?

It certainly never has as yet been so decided. So far from it, the reasoning of the Supreme Court, in *Ter Hoven* vs. *Kerns*, 2 Barr, 96, is the other way—though it was not, indeed, the point decided—which justified the reporter in stating it with a quære in the syllabus. The point in that case was, whether the mortgagee must have actual notice, and it was held that record notice of the junior liens was enough. Judge Kennedy says, that it is true generally, and perhaps universally, that the prior incumbrancer is not bound to look to the entry of subsequent incumbrances, when the incumbrance is given to secure the payment of a debt in being, the amount of which is fixed and mentioned, or as an indemnity against future liabilities, which may or shall arise from having become bail or surety for the incumbrancer; and it will be found to have been the ruling, as well as the concluding reason of the judgment, that he was under no obligation to make future advances, and that therefore there was no good reason why he should be regarded otherwise in making future advances, than if he were making advances to the parties for the first time.

On principle, if there is an absolute covenant to pay, it is *debitum in presenti solvendum in futuro*. Why cannot the debtor accept such an obligation as actual payment—actual fraud on creditors being out of the question, and legal fraud being put out of the question, by the stipulation or understanding that the mortgage can only be enforced to realize the sums actually advanced. If I give my bond to a friend, payable in one year, upon which he can realize the money in the market, surely I can take a mortgage from him to secure the advance, as much as if I had borrowed the money myself upon such security, and paid him the money. And how does such case differ from that now before the Court? Certainly in form only, if there is any difference, not in the substance of the thing.

But an attempt has been made to apply the principle of *Friedley* vs. *Hamilton*, 17 S. & R. 27, that the registry of an absolute deed, with an unrecorded defeasance, verbal or written, is not a sufficient recording to make it available as a mortgage against future liens. That case did not give satisfaction to the profession, and certainly

was in conflict with many prior cases. It has been acquiesced in, however, and is now beyond question the settled law of the land. Here, however, the security was in form of a mortgage. It was conditioned simply to pay the sum agreed to be advanced. It is supposed that, not having referred expressly to the covenant, or recited the terms of that covenant, the record does not truly express the nature of the transaction; it is likened to a mortgage for a large sum, with an unrecorded defeasance that it shall be void on the payment of a less sum. *Garber* vs. *Henry*, 6 Watts, 57, is relied on in support of this view. It is enough to say, that in that case the mortgage was sustained. There the condition was not to pay any particular sum of money, but to pay such sums as the mortgagor might, from time to time, owe to the mortgagee, according to an agreement entered into between the parties, the agreement not being recorded nor its date given. All that was laid down was, that the agreement as contained in the record of the lien, should give all the requisite information of the extent and certainty of the contract, so that a junior creditor might, by inspection of the record, and by common prudence and ordinary diligence, ascertain the extent of the incumbrance. The case before us is a much stronger and better one than that. Here the junior creditor is informed of the precise sum constituting the true extent of the lien, without being driven, as in *Garber* vs. *Henry*, to an inquiry *in pais* of the parties to the mortgage.

If the position already taken be a sound one, that the absolute covenant to advance at a certain time be a present debt, then the condition was truly and perfectly expressed. It cannot be that the nature of the transaction, out of which the mortgage grows, or the character of the value advanced, must be set forth and truly described. Few mortgages would stand so rigid a test. The consideration of a mortgage for the purchase-money of land or goods, is really not so much money paid, but land or goods agreed to be worth so much money. If I give my note payable at a future time, and it is accepted as money, that certainly need not be stated in the record. A failure of the consideration of the mortgage is an equitable defence in all these cases. If the title to the land or

goods fail; if I refuse to pay the note which I gave, and secured myself by the mortgage; if, in the case before us, the covenantor had broken his covenant to make the advances, it would doubtless be a good defence. These cases all stand on the same footing, and the same reason exists in all of them, for spreading a full statement on the face of the record. Such would be the sweeping character of the principle we are called upon to adopt and apply to this case. It would uproot many honest securities, and render uncertain mortgages of daily necessity and occurrence. For these reasons we discharge this rule.

September 11.—SHARSWOOD, P. J. Upon a rule to set aside the *levari facias* in this case, and let a terre-tenant into defence, the opinion of the Court was fully expressed upon the validity of this mortgage, and upon the sufficiency of the record of it, to make it available against lien creditors and others. As other parties now appear, who did not take part then, we have heard these questions re-argued, and with ability; but it has not resulted in producing any change in our opinion.

As this disposes of the whole case, it is unnecessary to examine the other questions discussed, as to the validity of the liens, and the demand of an issue thereon. As, however, one point, the right of the Auditor, when there has been a judgment, on a *sci. fa.* on a mechanic's lien, to inquire and decide as to the regularity and validity of the lien, when the question arises between parties, other than those who were parties, and privies to the judgment, is one of considerable frequency and importance in practice, we think it proper to add that we are against the exceptants on that point.

A judgment may be attacked collaterally before an Auditor, for fraud or collusion; and if an issue is demanded, he may decide that it is fraudulent, as to the party impeaching, and exclude it from the distribution or postpone it.

It is not competent, however, for any third person to attack a judgment on the ground of error or irregularity, which can only be taken advantage of by a party or privy on writ of error.

When, however, a creditor has a lien prior to the date of the judgment, and it is claimed that the judgment takes priority of

him, because rendered upon the debt, which was a lien prior to the judgment, then it is competent to the creditor holding a lien prior to the date of the judgment, to discuss the validity of the prior lien.

A simple case will illustrate the position. A judgment has lost its lien by the lapse of five years, then another lien is entered, and afterwards upon a *sci. fa.* to revive the first judgment, a judgment of revival is entered, the intervening judgment creditor, purchaser, or mortgagee, may undoubtedly show that the lien of the revived judgment was gone, notwithstanding the judgment of revivor.

It does not appear in Lauman's Appeal, 8 Barr, 473, whether judgments upon the liens were obtained prior or subsequent to the entry of the judgments, which are called in the report, *subsequent.* If they were subsequent, the decision in that case is entirely consistent with the opinion now expressed. We cannot think that the Supreme Court meant to decide that if a mechanic's claim was not a valid lien, from a want of compliance with the requisites of the Act of Assembly—if it was uncertain as to the description—failed in specifying the date, character and amount of the claim—if it had not been filed in time—that these defects would all be waived, as against an intervening creditor, mortgagee, or purchaser, by a judgment of which he had no notice, and to which he was no party.

There may be reason for holding, and it is all we can suppose that the Supreme Court meant to decide, that a man who lends or pays his money after the judgment, takes subject to the lien of the judgment, *qua* judgment, which may have, with great appearance of justice, the effect given to it of a general judgment, though its lien may, from the nature of its proceedings, be merely specific. Thus, a judgment on a *sci. fa.* on an unrecorded mortgage, may be a lien from its date, *qua* judgment. But, surely, a party who had advanced his money before upon the faith that there was no record, or that the record was insufficient and void, is not concluded by the subsequent judgment on the *sci. fa.* to which he was neither party nor privy. It would be monstrous so to hold. A judgment is evident to all the world that there is such a judgment, with all its legal effect as a judgment—a debt of record with lien. No mere

stranger can object that it is erroneous, but beyond its legal effect as a judgment, as evidence that the debt recovered was due ten days, or ten years before, that the debt had a particular quality or anything else, though, as between the parties, entering into the very vitality of the judgment, it is not even evidence as against strangers, much less conclusive of their rights.

Exceptions dismissed.

The case was argued in the Supreme Court, by

E. Ingersoll, *Lawrence*, *Porter* and *McElroy*, for appellants, and *McMurtrie* and *Cadwalader*, for appellees.

It was afterwards re-argued on the question, whether the mortgages were well recorded, the collateral agreement not having been recorded.

For appellants.—The record should have contained a notice of the true consideration and real state of the title, 4 Kent, 175. *Pettibone* vs. *Griswold*, 4 Conn. 158; *Stoughton* vs. *Pasco*, 5 ib. 446; *Freedly* vs. *Hamilton*, 17 S. & R. 72; *Jacques* vs. *Weeks*, 7 Watts, 268. Where the consideration is to secure future advances this fact must appear, and creditors be able to learn the amount, *Lyle* vs. *Ducomb*, 5 Bin. 585; *Stewart* vs. *Stocker*, 1 W. 140; *Irvin* vs. *Tabb*, 17 S. & R. 420, 421, 423; *Garber* vs. *Henry*, 6 W. 59.

2d. In the case of future advances, liens attaching before advance made, have priority, (*Ter-Hoven* vs. *Kerns*, 2 Barr, 96,) and this is such a case, for until advances made there was no debt and no consideration, and until then no lien.

3d. It is the agreement that these mortgages shall be postponed to mechanics,—there is a stipulation that the money is to be paid to them and releases obtained. If it were not so, then the contract is a fraud on the mechanics' lien law, for the existence of such liens were contemplated, and intended to be avoided.

For appellees.—That such a security can be taken and is valid from its inception, is shown by *Shirras* vs. *Craig*, 7 Cran. 34; *Lyle* vs. *Ducomb*, 5 Bin. 585; *Parmentier* vs. *Gillespie*, 9 Barr, 86, all of which were securities against future contingent liabilities.

2. The details need not appear on the record. The statute requires but the recording of the mortgage, and the nature of the liability or debt is immaterial. The record must speak the truth, and must show that it is a mortgage and the extent of the lien; nothing more. *Lyle* vs. *Ducomb*; *Hamilton* vs. *Freedly*; *Cover* vs. *Black*, 1 Barr, 493; *Gordon* vs. *Preston*, 1 W. 385; *Bank* vs. *Bank*, 7 W. & S. 395; *Jacques* vs. *Weeks*. This was not such a case of future advances, as is referred to in the decisions,—those were optional, here they were on a condition beyond Cadwalader's control. The distinction is taken in 2 Barr, 96, 99. An undertaking to pay at a future time, is equivalent to actual payment as a consideration, and this contract and its consequences are thus secured. This is fully decided in *Miller* vs. *Howry*, 3 Penna. 374; *Ledyard* vs. *Butler*, 9 Paig. 132, 136, 137; *Crane* vs. *Deming*, 7 Conn. 388. *Hubbard* vs. *Savage*, 8 ib. 215. The record of the mortgage (Mortg. Bk. J. C. p. 74) shows that the agreement referred to in *Lyle* vs. *Ducomb* was not recorded, though endorsed on the mortgage. *Stewart* vs. *Stocker*, 1 W. 140; *Riley* vs. *Ellmaker*, 6 Wh. 545; *Edwards* vs. *Bank*, 1 G. & J. 362.

3d. The stipulation for the application of the fund, was for the better security of Cadwalader. *Edwards* vs. *The Bank*. But if any right was thus given to the mechanics, this payment to Montgomery was sufficient. *Balfour* vs. *Willard*, 16 Ves. 151, 156; 2 Sug. 35 § 9. And the mechanics have no right but under the statute, which expressly subjects them to liens then subsisting, and implies that they examine the record.

The opinion of the Supreme Court was delivered by

LOWRIE, J.—Montgomery gave to Cadwalader several mortgages conditioned altogether for the payment of $12,000, and we may treat them all as one. Shortly afterwards, Montgomery commenced the erection of several houses on the mortgaged property, and liens for the work and materials have been filed and judgments obtained on them, which claim precedence of the mortgage. It appears that no money had been actually lent to Montgomery on the mortgage until after the buildings were commenced, but that

its true consideration was a covenant not recorded, by which Cadwalader agreed to advance $12,000, in defined instalments, in order to enable Montgomery to make the improvements, and that it was actually advanced in accordance with the covenant.

Does the omission to record the covenant have the effect of postponing the mortgage to the liens for building? Why should it? Is it because the consideration of the debt is not set out in the bonds and mortgage? The expression of a consideration as such is never necessary to the validity of sealed instruments. But the debt expressed in the bonds is the consideration and subject matter of the mortgage, and as subject matter it was necessary to set it out, and it is done truly, and the parties have by their contract created a lien for that very debt.

It is said, however, that it was not properly a debt then owed, because the covenant which was the consideration of it, had not then been performed. But this conclusion is very plainly inconsequential; for a promise to be performed in future, is one of the most common of all kinds of consideration for a present debt, the strict legal character of the transaction depends upon the form in which the parties have invested it, the bonds for the covenant, and the covenant for the bonds, being each independent debts. How are they connected? Only by equity. If Cadwalader breaks his covenant, Montgomery may obtain relief in equity as against the bonds and mortgage. But he might not need this, for the remedy on the covenant might be complete.

If equity interferes to change the form given to the matter by parties, it does so for the purposes of equity, not inequity—to establish the claim according to its spirit, not to defeat it—to save the mortgagor and his creditors from the forfeiture and from the penalty, and compel the creditor to accept the real debt and interest—to save him and them from any fraud or mistake, and not to let them gain an advantage by it. The relevancy of Cadwalader's covenant is therefore only contingent. It might be important as a ground of equitable relief; but it has no strictly legal connection with the mortgage. It is entirely irrelevant, except on the allegation that the consideration of the bonds has failed. Here it did not

fail, and therefore the legal and the equitable aspects of the transaction coincide.

And such a covenant or collateral agreement as we have here, has never been required to be recorded. The Acts of Assembly simply require the recording of the mortgage. True, it was decided in *Hamilton* vs. *Freedly*, 17 S. & R. 70, that when the mortgage consists of a conveyance with a separate defeasance, the recording of the conveyance alone is not a compliance with the law, because by such a record it does not appear as a mortgage transaction. But the sharpness of this principle has been somewhat moderated in *Jacques* vs. *Weeks*, 7 Watts, 261, by holding such a record sufficient if the mortgagee is in possession, because this is notice enough to put people upon inquiry, when they may ascertain the true character of the claim. Yet such implied notice contains in it no indication of the terms of the mortgage. Of the same character is *M. & M. Bank* vs. *The Bank of Pennsylvania*, 7 W. & S. 335, where actual notice of the defeasance supplied the neglect of recording it. Of course these cases refer to the effect of such matters upon subsequent liens and purchases; for the mortgagor could not raise the question.

So, in *Garber* vs. *Henry*, 6 Watts, 57, the conveyance contained a condition that it was to be void on the payment of certain sums of money said to be mentioned in another agreement, but not set out in the conveyance. It was entirely imperfect as a mortgage, and in strict law it was absolute, for the condition was void for uncertainty, taking it by itself, and as it was recorded. Yet this reference to another instrument was regarded as sufficient in equity to make that instrument a part of the conveyance, and thus convert it into a mortgage; and therefore in equity it was a recorded mortgage, containing sufficient notice of a defeasance which was substantially unrecorded. And such is the case of *Crane* vs. *Deming*, 7 Conn. 388, and there it is said to be sufficient that the defeasible character of the instrument appear, with such information in relation to it as will direct inquiry, and guide investigation, and that it is no objection that the inquiries may be difficult to make, because of the distance of the mortgagor's residence, 7 Conn. 396, 4 Id. 162, 5 Id. 449, 6 Watts, 59.

The case of *Lyle* vs. *Ducomb*, 5 Binn. 585, is very nearly like the present one. It was, as recorded, a mortgage for a sum absolute; but there was an agreement showing that it was for endorsements made and to be made, which agreement has been ascertained, to have been unrecorded, though this is not noted in the report of the case. It differs in this, that the endorsements were made, but not paid before the contesting lien was created. It was held, however, that the fact that the debt was stated in the mortgage as absolute when it was not so, and that the collateral and qualifying agreement was not set out nor referred to, did not invalidate the lien of mortgage as to subsequent lien creditors; and this is the point of its relevancy here. And for this point, the case of *Lyle* vs. *Ducomb*, has become an authority all through the United States, and has never been doubted. The principle of it is affirmed everywhere, 7 Cranch, 34, 50; 9 Paige, 132; 8 Conn. 219; Paine's C. C. R. 525; 4 Johns. Ch. 64; 1 Pet. 448; 7 Vin. Ab. 52; pl. 3; 1 Watts, 140. It is involved in *Gordon* vs. *Preston*, 1 Watts, 385, where it is decided that the fact that the mortgage is for a greater sum, than is due, does not avoid it as to the other lien holders, unless there be fraud; and in all the numerous cases where mortgages to secure future advances are held to be good, for in these cases the information is necessarily indefinite and demands investigation.

It has been supposed that there is a public policy that demands, that the record of the mortgage shall be more specific than it is in this case, but the supposition is plainly disproved by the cases above referred to, and their evidence is corroborated by the practice in relation to judgments. Nothing is more common than to enter judgment for the penalty of bonds, without any notice being taken of the real debt in any part of the record. Unless where oyer is craved, the condition is no part of the record, where the old common law of a record is still adhered to.

In *Parmentier* vs. *Gillespie*, 9 Penn. State R. 86, this point was raised, and it was decided that a judgment confessed for a certain amount as due, was good, though it was really given for advances made and to be made, and this as against liens entered before the

advances were made, if they were made in pursuance of a previous agreement; and the same principle is involved in *Ter-Hoven* vs. *Kerns*, 2 P. St. R. 96, and in many other cases. 1 Watts, 140, 374; 3 Pa. R. 374; 16 Johns. 165; 5 Johns. Ch. 320. It has never been supposed that such a judgment was void because of the neglect to change the common law form for a record, in order to set out the equitable conditions on which it was given, and there would not be much equity in now declaring that the common law and common customs, and common forms of conveyancing are all wrong. In New York it has been considered important to have the true state of such judgments specified, and an Act of the Legislature has been passed requiring it.

Besides this, an assignment to secure debts is not void because of its being absolute on its face, 2 Johns. Ch. 283. A pawn or pledge of any kind is not void because its conditions do not appear. In debt on bond to secure the performance of conditions, only the broken conditions appear on the record, yet the judgment for the penalty is a lien to secure the performance of others yet remaining unbroken.

And why should it not be so? No man deals in real estate on faith in the liens as recorded, for subsequent facts are continually changing their true character by payment and otherwise. To direct inquiry and guide investigation is therefore a main purpose of the record.

But it is argued that since Cadwalader had not advanced the money when the buildings were commenced, it was his duty to see that it was properly appropriated to pay the builders, and thus discharge their liens.

The least reflection will show, however, that this is only another mode of stating the proposition which we have already disproved: for his lien is postponed if its priority is conditioned upon his paying theirs, but we may notice it farther.

We have shown that the record of the mortgage is notice of the lien which Cadwalader had obtained, and it is therefore very plain that the builders undertook the work subject to Cadwalader's rights. In other words, they have no claims upon him, either to

yield the position which he has obtained, or to treat with them, that he may be allowed to maintain it: they can claim no right under such circumstances, which the owner could not grant.

Cadwalader's covenant binds him to aid the work by advancing money in proportion to the progress of the work. But as soon as the work commenced the builder's liens commenced, and it is argued that as Cadwalader had then advanced no money, their liens took precedence of his, and that, of consequence, he was not bound by his covenant to make advances, and those made after that were voluntary, and could not cut out the builders' liens.

This argument begins by assuming the proposition which has already been disproved, that the advances and not the mortgage created the lien; though the contract with the parties is, with notice to all the world, expressly otherwise. It is arguing in a circle, by using the conclusion as a means of proving itself.

Next, the argument makes the commencement of the work, for which Montgomery had Cadwalader's covenant to aid him, the very ground of relieving Cadwalader from his covenant. The commencement of the work created a prior lien, and therefore Cadwalader is excused from making his advances until that is removed. This is to make the contract defeat itself: it makes it void from the beginning, because it is impracticable: and the houses can never be erected, because the first shovel full of earth removed, creates a lien, that shuts down the coffers out of which it is to be paid for; or the laying of the first floor of joists on these thirty-two houses, stops their further erection, because it creates a lien that cuts off the mortgage by which the money was to be supplied.

If the owners of these liens trusted Montgomery without examining the state of the records, the law provides no relief from the consequences of their negligence, and morality does not demand that it should, and even charity will not allow it at the expense of more careful men. If they did examine the records, then they found the lien of Cadwalader standing good against Montgomery, and honestly forbids them to cut it out for their profit. If they found it and still trusted Montgomery without inquiry, then they agreed to trust him even with a lien against him of $12,000, and with no

apparent means to pay them. If they made inquiries, then they learned that he would have $12,000 in hands to pay for the improvements he was making, and they trusted him that he would appropriate it properly. In no way that we can regard this case can we perceive that the appellants have any show of equity, to demand that their claims shall be preferred to the mortgage.

Decree affirmed at the cost of the Appellants.

WOODWARD and KNOX, JJ. dissented.

Common Pleas, Philadelphia County, Pa., 1824.

PERRY *vs.* KINLEY.

Under the rules of the Courts of Equity in Pennsylvania, a defendant may by answer protect himself against discovery, through a denial of the camplainant's title, to the same extent as he could by plea in England; and he is not deprived of this right by submitting unnecessarily to answer some of the interrogatories of the bill, against which he might also have protected himself.

In Equity. Exceptions to answer.

THOMPSON, P. J.—The exceptions taken to the sufficiency of the answer, are based upon the rule of the English Chancery Courts, that a defendant who submits to answer, must answer fully—at least so far as to enable the plaintiff to have a decree against him. It was for a long time an unsettled question whether the defendant could in his answer deny the plaintiff's right, and refuse the discovery, to which the right, thus denied, alone entitled the defendant.

This manner of pleading which Lord Eldon, in *Shaw* vs. *Ching*, 11 Ves. 305, styles a sort of illegitimate pleading, and in *Somerville* vs. *Mackay*, 16 *Ves.* 387; speaks of as inconvenient, seems, to have been abandoned in England, in conformity with the views of Sir John Leach, V. C., expressed in *Mazeraddo* vs. *Maitland*, 3 Mad. 66; and in——— vs. *Harrison*, 4 Mad. 252, in which the

rule that a party cannot by his answer, protect himself from answering, is considered settled. In New York also, this general rule prevails, to which there are but few well established exceptions. *Bank of Utica* vs. *Messereau*, 7 Paige, 71.

In those Courts the defendant can object to the discovery sought, only by demurrer or plea—where, however the case requires an answer to sustain the plea, in order to give the plaintiff the advantage of such facts as are within the defendant's knowledge, and would tend to support the plaintiff's case, *Thring* vs. *Edgar*, 2 S. & S., 457; it is sometimes difficult to ascertain the limits to which the plea and answer are severally to extend. If the answer disclose too much, the plea is considered to be overruled, and if not sufficiently full, upon argument of the plea, every fact stated in the bill and not denied by the answer, must be taken as true—*Roche* vs. *Mogell*, 2 Sch. & Ves., 724; *Jones* vs. *Davis*, 16 Ves. 262.

To avoid these difficulties, and in order to simplify an abstruse subject, our Supreme Court, have adopted the form of pleading, so little regarded in England, and by an express rule permits a defendant to insist upon all matters of defence in his answer, either in law or to the merits of the bill of which he may be entitled to avail himself by plea. Whenever a plea will protect him from discovery, his answer will have the same effect. It is not denied that in the case before us, the defendant might by a plea, have protected himself from the discovery sought by the interrogatories, to which it is alleged he has not fully answered. By his plea he might have put the plaintiff upon proof of the alleged trust, and having denied the existence of such trust by his answer, he is equally protected from the discovery called for. That the defendant has answered a part of the interrogatories more fully than was necessary, and thus afforded to the plaintiff evidence of facts which he might have refused to disclose, while he explicitly denies the *principal fact* of the trust, cannot under the circumstances of this case, deprive him of the benefit of the rule of Court. He is still protected from the discovery which a plea would have avoided. The exceptions taken on this ground are therefore overruled.